92-1948

No. _____

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

WILLIAM V. WALKER, TRUSTEE
FOR MINRO OIL, INC.,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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June 2, 1993

QUESTIONS PRESENTED

I.

Does FED. R. APP. P. 4(a)(6) limit FED. R. CIV. P. 60(b) as declared by the United States Court of Appeals for the Fifth Circuit when it held that the district judge has no discretion to vacate his order pursuant to FED. R. CIV. P. 60(b) after 180 days from the date of the entry of the original order when the motion otherwise was properly filed and granted within the one-year limit established under FED. R. CIV. P. 60(b)(1)?

II.

Does the holding of the United States Court of Appeals for the Fifth Circuit in the instant case conflict with the recent ruling of this Court in *Pioneer Investment Services Co. v. Brunswick Associates Limited Partnership*, decided on March 24, 1993, and the holdings of the United States Court of Appeals for the Eleventh Circuit when these courts have declared that FED. R. CIV. P. 60(b) is a viable procedure for obtaining relief for an untimely filing; provided that the court finds a basis for establishing "excusable neglect"?

III.

Can the United States Court of Appeals for the Fifth Circuit and the United States of America ("Respondent") consider on appeal and contest an order of the district court on grounds of abuse of discretion when the Respondent failed to file a cross-appeal of the district court's amended order of January 13, 1992, which vacated its original order of March 11, 1991, but raised the issue through argument in its Reply Brief to the appeal brought by Petitioner?

LIST OF PARTIES
and RULE 28.1 LIST

The parties to the proceedings below were the petitioner William V. Walker, Trustee of Minro Oil, Inc., Debtor, and the respondent was the United States of America through its agency, the Internal Revenue Service.

Minro Oil, Inc. is a Chapter 11 Bankruptcy Debtor acting through its trustee and has no parent companies, subsidiaries or affiliates to list pursuant to Rule 28.1.

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A.

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B.

The decision below conflicts with the recent opinion of this Court in *Pioneer Investment Services Co. v. Brunswick Associates Limited*

Partnership, decided on March 24, 1993, and with prior rulings of this Court and with the decisions of the Court of Appeals for the Eleventh Circuit concerning the use of FED. R. CIV. P. 60(b) to reopen final judgments and orders. 10

C.

The Respondent failed to file a cross-appeal of the district court order vacating the original order and entering its amended order of January 13, 1992, and it cannot without filing a cross-appeal attack the adverse ruling of the January 13, 1993 order and the amended order through argument in its reply brief to the appeal brought by Petitioner. . . . 12

D.

The issues presented by the lower court decision should be addressed by this Court, as the final authority on interpretations of the federal procedural rules, and this Court should issue its opinion and interpretation on the conflict which apparently exists between the Federal Rules of Civil Procedure and the Federal Rules of Appellate Procedure, rather than have this important issue hidden in an unreported decision of the lower court. 14

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

WILLIAM V. WALKER, TRUSTEE FOR MINRO OIL, INC.,
Petitioner

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioner William V. Walker, Trustee of Minro Oil, Inc., Debtor, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled proceeding on December 31, 1992, and for which a timely filed rehearing was denied on February 3, 1993.

OPINIONS AND ORDER BELOW

[All opinions and orders unreported]

Item 1

Opinion of the Court of Appeals for the Fifth Circuit is an unreported decision and is reprinted in the Appendix hereto.

Item 2

Amended Order of January 13, 1992, of the United States District Court for the Southern District of Texas has not been reported (Sim Lake, U.S. District Judge) and is reprinted in the Appendix hereto.

Item 3

Order of January 13, 1992 of the United States District Court for the Southern District of Texas is reprinted in the Appendix hereto.

Item 4

Petition for Rehearing of January 13, 1993, denied February 3, 1993 is reprinted in the Appendix hereto.

JURISDICTION

The Petitioner originally brought this suit in 1981 under 28 U.S.C. § 1334, 11 U.S.C. § 505 and 11 U.S.C. § 542 while Minro Oil, Inc. was a debtor in a Chapter 7 bankruptcy proceeding (converted later to Chapter 11) in the United States Bankruptcy Court for the Southern District of Texas, Houston, Division.

The appeal of the Bankruptcy court's decision was to the United States District Court in the Southern District of Texas pursuant to 28 U.S.C. § 158(a).

The appeal from the United States District Court's decision for the Southern District of Texas was pursuant to 28 U.S.C. § 1291 invoking the United States Court of Appeals for the Fifth Circuit's jurisdiction over a final decision of the district court.

The jurisdiction of this Court to review the decision of the Court of Appeals for the Fifth Circuit is invoked under 28 U.S.C. § 1254.

STATUTE INVOLVED

Federal Rules of Civil Procedure 60(b)

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court. Writ's of *coram nobis, coram vobis, audita querela*, and bills of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

Federal Rules of Appellate Procedure 4(a)

(a) Appeals in Civil Cases.

(1) In a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from; but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days after such entry. If a notice of appeal is mistakenly filed in the court of appeals, the clerk of the court of appeals shall note thereon the date on which it was received and transmit it to the clerk of the district court and it shall be deemed filed in the district court on the date so noted.

(2) Except as provided in (a)(4) of this Rule 4, a notice of appeal filed after the announcement of a decision or order but before the entry of the judgment or order shall be treated as filed after such entry and on the day thereof.

(3) If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days after the date on which the first notice of appeal was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period last expires.

(4) If a timely motion under the Federal Rules of Civil Procedure is filed in the district court by any party; (i) for judgment under Rule 50(b); (ii) under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (iii) under Rule 59 to alter or amend the judgment; or (iv) under Rule 59 for a new trial, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of

appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion as provided above. No additional fees shall be required for such filing.

(5) The district court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by this Rule 4(a). Any such motion which is filed before expiration of the prescribed time may be *ex parte* unless the court otherwise requires. Notice of any such motion which is filed after expiration of the prescribed time shall be given to the other parties in accordance with local rules. No such extension shall exceed 30 days past such prescribed time or 10 days from the date of entry of the order granting the motion, whichever occurs later.

(6) The district court, if it finds (a) that a party entitled to notice of the entry of a judgment or order did not receive such notice from the clerk or any party within 21 days of its entry and (b) that no party would be prejudiced, may, upon motion filed within 180 days of entry of the judgment or order or within 7 days of receipt of such notice, whichever is earlier, reopen the time for appeal for a period of 14 days from the date of entry of the order reopening the time for appeal.

(7) A judgment or order is entered within the meaning of this Rule 4(a) when it is entered in compliance with Rules 58 and 79(a) of the Federal Rules of Civil Procedure.

STATEMENT OF THE CASE

On October 6, 1981, Petitioner brought an adversary proceeding to compel turnover of a corporate income tax overpayment of $900,000.00 for Minro Oil, Inc. ("Minro"). The Petitioner's Second Amended Complaint and the Respondent's Answer and Counterclaim were joined in trial on May 18, 1989. The parties submitted stipulations on substantially all issues, but the claim for federal windfall profit taxes on crude oil purchased was not agreed. The bankruptcy court entered its Judgment and its Findings of Fact and Conclusions of Law on March 12, 1990. The bankruptcy court found for the Petitioner on some issues, but it found Minro liable for failing to withhold windfall profit taxes for certain producer-taxpayers.

On March 21, 1990, the Petitioner timely filed notice of appeal to the district court on certain matters of federal law. On March 11, 1991, the judge of the district court entered an order affirming the lower court's judgment and dismissing the appeal. On December 6, 1991, the Petitioner filed a motion under FED. R. CIV. P. 60(b) to vacate the original order and to re-enter an amended order. The motion attested to diligence on behalf of the Petitioner and his counsel and exceptional circumstances that demonstrated to the court that sufficient cause existed for the relief requested. On January 13, 1992, the district court granted the relief requested, and it entered an order vacating the March 11, 1991, order and it entered an amended order upholding the decision in the bankruptcy court. The district judge found that the strict grounds established for granting a motion under FED. R. CIV. P. 60(b) by the United States Court of Appeals for the Fifth Circuit had been satisfied by Petitioner. The Petitioner filed a notice of appeal from the amended order of the district court on March 6, 1992, to the United States Court of Appeals for the Fifth Circuit, pursuant to FED. R. APP. P. 4(a)(1).

The Respondent never filed a cross-appeal from either the order granting Petitioner's motion to vacate the original order or the amended order of January 13, 1992. Notwithstanding that, the Respondent argued in its reply brief filed August 28, 1992, that the United States Court of Appeals for the Fifth Circuit was without jurisdiction to hear this matter because the Petitioner did not comply with the new provision of FED. R. APP. P. 4(a)(6) which became effective December 1, 1991. The United States Court of Appeals for the Fifth Circuit put the matter on the summary calendar and dismissed the appeal on December 31, 1992, because the district court "did abuse its discretion" in vacating the old order and entering the amended order when it took action on a motion over 180 days after entry of the initial order, notwithstanding that the district court vacated the initial order and entered the amended order pursuant to FED. R. CIV. P. 60(b). Appendix, Item 1, at p.3. The Petitioner filed a timely motion for rehearing on January 13, 1993, and the motion was denied on February 3, 1993.

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

A.

The decision below is a case of first impression, which judicially limits the one-year period provided in FED. R. CIV. P. 60(b) and gives the district judge no discretion under any circumstances to consider motions to reopen judgments after 180 days.

This Court should determine this important question of federal law, because the Court of Appeals for the Fifth Circuit has effectively limited and amended FED. R. CIV. P. 60(b)(1) from a one-year time limit to 180 days. Further, the Court of Appeals for the Fifth Circuit did not address whether its action in declaring that

a district judge has no discretion after 180 days applies to FED. R. CIV. P. 60(b)(6) which would permit a motion after one year if it is made "within a reasonable time."

The petitioner filed its motion under FED. R. CIV. P. 60(b) within the time period prescribed by the Rule, seeking to vacate an order of the district court. The district judge, after consideration of the facts and with full knowledge of the pronouncements of the Court of Appeals for the Fifth Circuit, as evidenced by his referral to *Wilson v. The Atwood Group*, 725 F.2d 255 (5th Cir.), *cert. denied*, 468 U.S. 1222 (1984), granted the motion vacating the prior order and entering an amended order. The Petitioner then filed a notice of appeal of the district court amended order. The panel of the Court of Appeals of the Fifth Circuit found that the district court "did abuse its discretion" by providing relief to the Petitioner 271 days after the entry of its order because such action was "in clear contravention of the 180-day limit of FED. R. APP. P. 4(a)(6)." Appendix, Item 1, at p. 3.

The interpretation applied by the Court of Appeals for the Fifth Circuit has no support in the Federal Rules of Civil Procedures or the Federal Rules of Appellate Procedure or any commentaries under the respective Rules. In fact, the leading commentator and authority on the subject has suggested that FED. R. CIV. P. 60(b) remains a viable alternative to the restriction of FED. R. APP. P. 4(a)(6), if the movant can support the motion and the motion is granted. See 9 J. MOORE, B. WARD & J. LUCAS, MOORE'S FEDERAL PRACTICE ¶ 204.13[5] (2d ed. 1992). The treatise recounts the history prior to the 1991 amendments which establish that the only relief afforded to a party who did not receive notice of the entry of an order from the clerk in time to file a FED. R. APP. P. 4(a)(1) appeal was through FED. R. APP. P. 4(a)(5) or FED. R. CIV. P. 60(b). The treatise confirms that in response to the hardships caused and the perception that clerical failures and mistakes on the part of the clerk were becoming more common, that FED. R. APP. P. 4(a)(6) was added in 1991 to expand the time in which a court may reopen time for appeal. J.

MOORE, *supra*. The commentator, however, notes that the existence of FED. R. APP. P. 4(a)(6) did not restrict the use of FED. R. CIV. P. 60(b), and FED. R. CIV. P. 60(b) continues to merit consideration for application in those cases when relief under FED. R. APP. P. 4(a)(6) is not available. J. MOORE, *supra*. The treatise further states that under FED. R. CIV. P. 60(b):

> The district court undoubtedly has the power to vacate a judgment in appropriate circumstances and rehear the case, and the judgment entered after rehearing is appealable in due course, although it may be in substance the same as the first. J. MOORE, *supra*.

B.

The decision below conflicts with the recent opinion of this Court in *Pioneer Investment Services Co. v. Brunswick Associates Limited Partnership*, decided on March 24, 1993, and with prior rulings of this Court and with the decisions of the Court of Appeals for the Eleventh Circuit concerning the use of FED. R. CIV. P. 60(b) to reopen final judgments and orders.

The decision below by the Court of Appeals for the Fifth Circuit conflicts with the interpretation given to the use of FED. R. CIV. P. 60(b) by this Court. In the ruling of *Pioneer Investment Services Co. v. Brunswick Associates Limited Partnership* ___ U.S. ___, 1993 WL 79640 (U.S. Tenn.) (1993), this Court considered the standards for applying "excusable neglect" to relieve a party from an untimely filing of a proof of claim. This Court in the opinion reviewed the instances where the federal procedural rules applied the "excusable neglect" standard to permit filings out of time. The Court recognized that FED. R. CIV. P. 60(b), "...

permits courts to reopen judgments for reasons of 'mistake, inadvertence, surprise, or excusable neglect,' but only on motions made within one year of the judgment." *Supra*, at 7. The Court further noted that "relief must be sought within one year under subsection (1) and the party's neglect must be excusable." *Id.*

In the instant case, Petitioner filed the FED. R. CIV. P. 60(b) motion within one year of the order for which relief was requested. The district judge made findings that exceptional circumstances, more than mere failure to give notice existed. The district judge had discretion to consider the grounds which this Court approved in *Pioneer, supra*, at 7, and the district court granted the motion.

This Court has, on numerous occasions, declared that the granting of a motion under FED. R. CIV. P. 60(b) rests within the sound discretion of the district judge. This Court, in *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.*, 371 U.S. 215 (1962), vacated the order of the Court of Appeals of the Seventh Circuit which dismissed an appeal by an appellant who had received a favorable ruling from the lower court granting a FED. R. CIV. P. 60(b) motion on the issue of excusable neglect for failing to file a timely notice of appeal. *Harris Truck Lines*, at 217. The district court in the *Harris Truck Lines* case had made its ruling based on facts which displayed less compelling circumstances than those proffered by the Petitioner in the instant case. This Court would not disturb the district court ruling and reversed the Court of Appeals, holding that the district court had not abused its discretion. *Id.*

The decision of the lower court also conflicts with the decisions of the Court of Appeals for the Eleventh Circuit. That court, in December 1991, in *Useden v. Acker*, 947 F.2d 1563 (11th Cir. 1991), confirmed the viability of FED. R. CIV. P. 60(b). The Court of Appeals recognized that FED. R. CIV. P. 60(b) is an appropriate "escape valve" when counsel has acted diligently and in reliance upon statements of the trial court. *Id.* at 1570. The

court further refers to its previous decision in *Harnish v. Manatee County*, 783 F.2d 1535,,1538 (11th Cir. 1986) which supports this application of FED. R. CIV. P. 60(b).

The district judge in the instant case acknowledged the limitations placed on him under the decision of the Court of Appeals for the Fifth Circuit in *Wilson v. The Atwood Group, supra*. The conditions placed on the district court in reviewing the motion in *Wilson v. The Atwood Group* are more rigorous than the conditions which this Court considered in *Harris Truck Lines, supra*, when this Court required the Court of Appeals to withdraw the dismissal because there was no showing to rebut the findings and conclusions of the lower court. Great deference is usually accorded to a district judge on a finding of excusable neglect, particularly when the judge has a more intimate awareness of the circumstances surrounding the lapse of a period of time in that court. The Court of Appeals' decision in the instant case, however, precludes any discretion by the district judge if the motion is made and ruled upon over 180 days after the entry of the original order.

C.

The Respondent failed to file a cross-appeal of the district court order vacating the original order and entering its amended order of January 13, 1992, and it cannot without filing a cross-appeal attack the adverse ruling of the January 13, 1993 order and the amended order through argument in its reply brief to the appeal brought by Petitioner.

The Respondent failed to a file a notice of appeal or a motion for reconsideration in response to the district court's amended order of January 13, 1992. The Petitioner filed a notice of appeal within 60 days of that date, on March 6, 1992, pursuant

to FED. R. APP. P. 4(a)(1). Under FED. R. APP. P. 4(a)(3) the Respondent had 14 days after that date in which it could file a cross-appeal objecting to the district court's action of vacating the original order and of entering the amended order. The Respondent would then have become a cross-appellant under FED. R. APP. P. 28(h). The Respondent complained of the amended order of January 13, 1992, in its reply brief filed on August 28, 1992, for the first time without cross-appealing this issue.

Without addressing the failure to file a cross-appeal issue, which was raised by the Petitioner in its reply brief, the Court of Appeals has decided, apparently, that in this case a cross-appeal was not necessary for the Respondent to attack the amended order. This Court, however, has consistently followed the principle that a properly filed notice of cross-appeal is necessary to pursue a modification or reversal of a lower court's ruling. The decision of this Court, which is referred to with consistency throughout the courts of appeal, is *United States v. American Railway Express Co.*, 265 U.S. 425 (1924). In that opinion, this Court declared:

> A party who does not appeal from a final decree of the trial court cannot be heard in opposition thereto when the case is brought here by the appeal of the adverse party. In other words, the Appellee may not attack the decree with a view either to enlarging his own rights thereunder or of lessening rights of his adversary, whether what he seeks is to correct an error or to supplement the decree with respect to a matter not dealt with below. *Id.* at 435.

This court has affirmed this principle, even in cases when the appellee is complaining about untimely action which allegedly affects the jurisdiction of the party appealing the order. This Court ruled that the appellee may not question the jurisdiction of a court during an appeal unless the appellee has properly filed a cross-appeal. *The Alaskan Industrial Board v. Chugach Electric Ass'n,*

Inc., 356 U.S. 320, 324-25 (1958). This court also affirmed this principle in *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394 (1981), when it declared that the doctrine of *res judicata* prevents attacking an unappealed adverse ruling. *Id.* at 398.

This case presents an important federal question, because the Court of Appeals has ignored the long line of cases, originating with *M'Donough v. Dannery*, 3 U.S. 188 (1796), that continues to this day, and stands for the proposition that a party who does not cross-appeal or cross-petition may not attack an order for the purposes of having an order modified or reversed in its favor for the first time on appeal of the other party.

D.

The issues presented by the lower court decision should be addressed by this Court, as the final authority on interpretations of the federal procedural rules, and this Court should issue its opinion and interpretation on the conflict which apparently exists between the Federal Rules of Civil Procedure and the Federal Rules of Appellate Procedure, rather than have this important issue hidden in an unreported decision of the lower court.

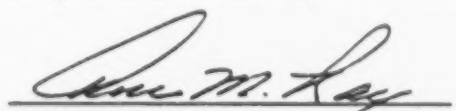
The panel of the Court of Appeals for the Fifth Circuit that decided this case apparently does not share Petitioner's view of the impact and consequences of its decision in this case. Through its action in this case, the Court of Appeals for the Fifth Circuit has decided that, when the conflict between the time limits prescribed in the FED. R. CIV. P. 60(b) and the FED. R. APP. P. 4(a)(6) are joined, the 180-day limitation of the FED. R. APP. P. 4(a)(6) limits the one-year filing limit under FED. R. CIV. P. 60(b). A decision of this significance requires that this Court act in order to protect the diligent efforts of the practicing bar and in order to give notice to all district judges of the limitations placed on FED. R. CIV. P.

60(b). Obviously, the district judge in this case did not recognize that he had no discretion to enter an order after the 180 days from the date of the original order. The practicing bar must be put on notice that the diligence which was exhibited by counsel in this case will not be sufficient to excuse mistakes by the clerk of the court or by other court personnel in any case taken under advisement. The practicing bar must be told that it must vigilantly and without exception demand a prompt, complete, certified status report for any matter under advisement in order to preclude the absolute bar which the 180-day limitation prescribes. The district judges of the federal court systems must be admonished that any inquiry concerning a case must be responded to by their staff promptly and in writing in order to avoid the Draconian consequences which the Court of Appeals has mandated.

CONCLUSION

For all of the above reasons, the Court should grant this Petition for *Writ of Certiorari*.

Respectfully submitted,



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April 30, 1993

APPENDIX

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[All opinions and orders unreported]

Opinion of the Court of Appeals for the Fifth Circuit.

Amended Order of January 13, 1992, of the United States District Court for the Southern District of Texas.

Order of January 13, 1992 of the United States District court for the Southern District of Texas.

Petition for Rehearing of January 13, 1993, denied February 3, 1993.

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

U.S. COURT OF APPEALS
FILED
DEC 31 1992
RICHARD E. WINDHORST,JR.
CLERK

No. 92-2203

IN THE MATTER OF: WILLIAM V. WALKER, TRUSTEE FOR MINRO OIL, INC.,

Debtor.

WILLIAM V. WALKER, TRUSTEE FOR MINRO OIL, INC.,

Plaintiff-Appellant,

versus

UNITED STATES OF AMERICA,

Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Texas
(CA-H-90-1206)

Before REAVLEY, SMITH and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:[1]

William V. Walker ("Walker"), trustee for the bankrupt Minro Oil Co. ("Minro"), initiated this adversary proceeding by filing an action

[1] Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

against the United States for the refund of $900,000.00 in corporate income tax prepaid by Minro. The United States eventually refunded $263,962.08, but retained the balance as an offset against unemployment, withholding, social security, and windfall profit taxes that it claimed Minro owed prior to its bankruptcy. Walker contested only Minro's liability for some $545,000.00 in windfall profit taxes.

The bankruptcy court found that Minro was liable for $593,574.65 in unpaid taxes and penalties, and ordered the United States to setoff that amount against the $636,037.92 that it was holding and return the balance to Minro. Walker appealed to the district court, which entered an order affirming the judgment of the bankruptcy court and dismissing Walker's appeal with prejudice on March 11, 1991.

Due to exigent circumstances, Walker's counsel did not receive a copy of the district court's judgment until November 25, 1991. Walker filed a motion, dated December 6, 1991, requesting the district court to vacate its prior judgment and re-enter judgment, so as to facilitate a timely appeal. The district court did so, and re-entered judgment on January 10, 1992. Walker filed his notice of appeal to this court on March 6, 1992.

The United States contends that Walker's notice of appeal was not timely filed, in light of recent amendments to Federal Rule of Appellate Procedure 4(a). We agree.

Appellate Rule 4(a) now reads, in relevant part:

> The district court, if it finds (a) that a party entitled to notice of entry of a judgment or order did not receive such notice from the clerk or any party within 21 days of its entry and (b) that no party would be prejudiced, may, upon motion filed within 180 days of entry of the judgment or order or within 7 days or receipt of such notice, whichever is earlier, reopen the time for appeal for a period of 14 days from the date of entry of the order reopening the time for appeal.

Fed. R. App. P. 4(a)(6) (emphasis added). This new version of Appellate Rule 4(a) "t[ook] effect on December 1, 1991, and . . . govern[s] all proceedings in appellate cases thereafter commenced." *In re Jones*, 970 F.2d 36, 38 & n.2 (5th Cir. 1992) (quoting Order of the Supreme Court of the United States, April 30, 1991, *reprinted in* 111 S. Ct. 1011 (interim ed.)).

Walker's counsel had moved and did not receive notice of the district court's judgment from the clerk. Despite a number of attempts to ascertain whether the district court had entered a judgment or an order, neither Walker nor his counsel became aware of the judgment until the time for filing an appeal under Fed. R. App. P. 4(a)(1) -- here 60 days, because the United States was a party -- had run. The question is whether the clerk's failure to assure that Walker's counsel received timely notice of the judgment should allow Walker to file an out-of-time notice of appeal.

In *Jones*, this court held that the district court did not abuse its discretion by refusing discretionary relief under Appellate Rule 4(a)(6) to the Joneses some 87 days after entry of its judgment. Here, we hold that

the district court did abuse its discretion by providing relief to Walke

271 days after entry of the judgment, in clear contravention of the 1

limit of Fed. R. App. P. 4(a)(6).

APPEAL DISMISSED.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
ENTERED

JAN 10 1992

Jesse E. Clark, Clerk
By Deputy:

IN RE:	§	UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF TEXAS ENTERED
	§	
MINRO OIL, INC.,	§	
	§	
Debtor	§	JAN 13 1992
WILLIAM V. WALKER, TRUSTEE,	§	Jesse E. Clark, Clerk By Deputy:
	§	
Appellant,	§	
	§	CIVIL ACTION NO. H-90-1206
v.	§	
	§	ADVERSARY NO. 81-0881-H2
UNITED STATES OF AMERICA,	§	BANKRUPTCY 80-01850-H2-4
	§	
Appellee.	§	

AMENDED ORDER

William V. Walker, Trustee of Minro Oil, Inc., appeals a judgment of the Bankruptcy Court that ordered the United States of America to recover from Minro Oil, Inc. various pre-petition taxes and interest.

A bankruptcy court's findings of fact shall not be set aside unless clearly erroneous. Bankr. R. 8013; Anderson v. City of Bessemer City, 470 U.S. 564, 105 S.Ct. 1504 (1985). A finding of fact is clearly

erroneous "when although there is evidence to support it, the reviewing court on the entire evidence is left with a firm and definite conviction that a mistake has been committed." United States v. United States Gypsum Co., 333 U.S. 364, 395, 68 S.Ct. 525, 542 (1948). A bankruptcy court's conclusions of law, however, are subject to plenary review. In re Missionary Baptist Foundation of America, Inc., 712 F.2d 206, 209 (5th Cir. 1983).

This Court, having carefully reviewed the record and the arguments of counsel and having found and concluded that the Bankruptcy Court's Order should be AFFIRMED and that this appeal be DISMISSED with prejudice, it is so ORDERED.

SIGNED at Houston, Texas, on this 10th day of January, 1992.

/s/
SIM LAKE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
ENTERED

JAN 10 1992

Jesse E. Clark, Clerk
By Deputy:

IN RE:	§	UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF TEXAS ENTERED
	§	
MINRO OIL, INC.,	§	
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	§	
Appellant,	§	
	§	CIVIL ACTION NO. H-90-1206
v.	§	
	§	ADVERSARY NO. 81-0881-H2
UNITED STATES OF AMERICA,	§	BANKRUPTCY 80-01850-H2-4
	§	
Appellee.	§	

ORDER

Pending before the Court is the Motion to Re-enter Judgment of William V. Walker, Trustee of Minro Oil, Inc. (Docket Entry No. 13). The affidavits supporting the motion establish that the District Clerk either failed to give effect to a January 18, 1990, Notice of Change of Address for counsel for the Trustee or failed to use the new address (5100 Westheimer, Suite 115) when mailing a copy of the Court's March 11, 1991, order to counsel for the Trustee. Although the docket sheet in Adversary No. 81-881-H2 bears counsel's new address, the docket sheet in Bankruptcy No.

80-01850-H2-4 bears the old address. Contained on the left side of the Court's file is a copy of the March 11, 1991, order, together with an envelope addressed to counsel for the Trustee at her old address, 1800 Bering, Suite 495. The envelope and enclosed order were returned to the clerk on April 11, 1991, by the postal service.

These facts alone would not warrant relief under Fed. R. Civ. P. 60(b). See Wilson v. Atwood Group, 725 F.2d 255, 258 (5th Cir. 1984) (en banc). However, in this case the Trustee has also submitted affidavits reflecting that Trustee's counsel attempted to determine the status of this case culminating in an October 24, 1991, letter to the Court which resulted in the mailing of a copy of the Court's March 11, 1991, order to counsel for the Trustee. Under these facts the Court concludes that the Trustee is entitled to relief under Fed. R. Civ. P. 60(b).

Accordingly, the Trustee's notice is GRANTED, the Court's order of March 11, 1991, is VACATED, and a new order affirming the bankruptcy courts' order and dismissing the Trustee's appeal from that order will be entered contemporaneously with this Order.

SIGNED at Houston, Texas, on this 10th day of January, 1992.

/s/
SIM LAKE
UNITED STATES DISTRICT JUDGE

/779-Bnk

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

U.S. COURT OF APPEALS
FILED
FEB 03 1993
RICHARD E. WINDHORST,JR.
CLERK

No. 92-2203

IN THE MATTER OF: WILLIAM V. WALKER, TRUSTEE FOR MINRO OIL, INC.,

Debtor.

WILLIAM V. WALKER, TRUSTEE FOR MINRO OIL, INC.,

Plaintiff-Appellant,

versus

UNITED STATES OF AMERICA,

Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Texas

ON PETITIONER FOR REHEARING

(January 13, 1993)

Before REAVLEY, SMITH and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in above entitled and numbered cause be and the same is hereby *denied*.

ENTERED FOR THE COURT:

/s/
United States Circuit Judge

CLERK'S NOTE:
SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.

REHG-4

FILED
JUL 27 1993
OFFICE OF THE CLERK

No. 92-1948

In the Supreme Court of the United States

OCTOBER TERM, 1993

WILLIAM V. WALKER, TRUSTEE, MINRO OIL INC.,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DREW S. DAYS, III
Solicitor General
MICHAEL L. PAUP
Acting Assistant Attorney General
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BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the court of appeals correctly held that it lacked jurisdiction to consider petitioner's appeal from the order of the district court.

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In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 92-1948

WILLIAM V. WALKER, TRUSTEE, MINRO OIL INC.,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-4) is unreported. The orders of the district court (Pet. App. 5-8) are unreported. The opinion of the bankruptcy court is also unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 31, 1992. The petition for rehearing was denied on February 3, 1993 (Pet. App. 9). The petition for a writ of certiorari was filed on May 3, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is the trustee for Minro Oil, Inc., a debtor in federal bankruptcy proceedings. Petitioner filed a complaint against the United States in the bankruptcy court seeking a refund of corporate income taxes that had been prepaid by Minro (Pet. App. 1-2). The bankruptcy court found that Minro was liable for $593,574.65 in unpaid taxes and penalties. The court ordered that liability to be set off against the prepaid taxes to be refunded (Pet. App. 2). Petitioner appealed the bankruptcy court's judgment to the district court.

2. On March 11, 1991, the district court entered an order affirming the judgment of the bankruptcy court (Pet. App. 2). Petitioner did not file a notice of appeal from the district court's order within the 60-day time period prescribed by Federal Rule of Appellate Procedure 4(a)(1). On December 6, 1991—which was 271 days after the issuance of the district court's order—petitioner filed a motion in the district court requesting the court to vacate and reenter its order so that petitioner could then file a timely notice of appeal from the new order (Pet. App. 2).

On January 10, 1992, the district court issued an order granting petitioner's motion (Pet. App. 7-8). The court found that petitioner was entitled to relief under Rule 60(b) of the Federal Rules of Civil Procedure because (i) a copy of the March 11, 1991, order had been been mailed to the wrong address and petitioner had not received notice of the order prior to the expiration of the period for filing a notice of appeal and (ii) petitioner's counsel had made efforts to ascertain the status of the case (Pet. App. 7-8). Petitioner then appealed to the court of appeals.

3. The court of appeals dismissed the appeal as untimely. The court of appeals observed that Rule 4(a)(6) of the Federal Rules of Appellate Procedure (which became effective on December 1, 1991, and therefore applies to this case) provides that a district court may reopen the time for appeal for a party who fails to receive notice of an order if the party files a motion seeking such relief within 180 days of the entry of the order (Pet. App. 2-3). Because petitioner's motion to vacate was filed after the 180-day period prescribed by Rule 4(a)(6), the court of appeals held that the district court abused its discretion by granting the requested relief (Pet. App. 3-4).

ARGUMENT

The court of appeals correctly held that it lacked jurisdiction to review petitioner's untimely appeal from the district court order affirming the judgment of the bankruptcy court. The decision of the court of appeals does not conflict with any decision of this Court or of any other court of appeals. Further review is therefore not warranted.

1. Rule 4(a)(6) of the Federal Rules of Appellate Procedure provides (emphasis added):

> The district court, if it finds (a) that a party entitled to notice of the entry of a judgment or order did not receive such notice from the clerk or any party within 21 days of its entry and (b) that no party would be prejudiced, may, *upon motion filed within 180 days of entry of the judgment or order* or within 7 days of receipt of such notice, whichever is earlier, reopen the time for appeal for a period of 14 days, from the date of entry of the order reopening the time for appeal.

As explained in the Advisory Committee Note, Rule 4(a)(6) "establishes an outer time limit of 180 days for a party who fails to receive timely notice of entry of a judgment to seek additional time to appeal." Rule 4(a)(6), like other Federal Rules of Appellate Procedure, governs appeals from district courts to courts of appeals in bankruptcy cases. Fed. R. App. P. 1(a); Bankruptcy Rule 8001, Advisory Committee Note.

The court of appeals correctly held in this case that the district court abused its discretion by vacating and reentering its prior order. It is undisputed that petitioner filed his motion to vacate the order 271 days after the order was entered. Petitioner's motion was thus filed well after the 180-day period established by Rule 4(a)(6) had expired. Because petitioner failed to file a timely notice of appeal from the district court's original order, and failed to file a timely motion to vacate that order in the district court, the court of appeals correctly dismissed the appeal for lack of jurisdiction.

2. Petitioner's contention (Pet. 8-10, 14-15) that the decision of the court of appeals impermissibly restricts the scope of Rule 60(b) of the Federal Rules of Civil Procedure overlooks the fact that Rule 60(b) was not applicable to the district court proceedings in this case. See *Conn Aire, Inc.* v. *J.C. Leasing*, 91 B.R. 462 (M.D. Tenn. 1988). The Federal Rules of Civil Procedure "do not apply to proceedings in bankruptcy * * * except in so far as they may be made applicable thereto by rules promulgated by [the] Supreme Court of the United States." Fed. R. Civ. P. 81(a)(1). "Appeals to district courts in bankruptcy cases are governed by Part VIII of the Bankruptcy

Rules. Bankr. R. 8001-8019." *In re Akros Installations, Inc.*, 834 F.2d 1526, 1531 (9th Cir. 1987). These rules do not contain any provision akin to Federal Rule of Civil Procedure 60(b). *Conn Aire, Inc.* v. *J.C. Leasing*, *supra*.[1] Accordingly, the court of appeals' decision in this case has no impact on the proper scope of Rule 60(b).

3. The decision of the court of appeals does not conflict with *Pioneer Investment Services Co.* v. *Brunswick Associates Limited Partnership*, 113 S. Ct. 1489 (1993), and *Useden* v. *Acker*, 947 F.2d 1563 (11th Cir. 1991), cert. denied, No. 91-1944 (June 7, 1993) as petitioner contends (Pet. 10-12). In *Pioneer Investment Services*, this Court resolved a conflict in the courts of appeals over the meaning of the term "excusable neglect" in Bankruptcy Rule 9006(b)(1). The Court's interpretation of Rule 9006(b)(1) in *Pioneer Investment Services*, however, has no bearing on the question presented in this case, which concerns whether a district court sitting as an appellate court in bankruptcy may vacate and reenter an order to allow a party to file a timely notice of appeal pursuant to a motion filed after the expiration of the 180-day time period prescribed by Federal Rule of Appellate Procedure 4(a)(6).

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[1] Rule 9024 of the Bankruptcy Rules makes Federal Rule of Civil Procedure 60(b) applicable to bankruptcy courts. Bankruptcy Rule 9024, however, does not apply to a district court that is sitting as an appellate court in bankruptcy. A district court acting in that capacity may entertain a motion for rehearing, but only if the motion is filed within 10 days of the entry of judgment. Bankr. R. 8015. Petitioner's motion to vacate in this case was filed long after the expiration of this 10-day period.

In *Useden* v. *Acker*, the court of appeals held that a district court that was *not* sitting as an appellate court in bankruptcy could vacate and reenter a prior order under Rule 60(b) to allow a party to file a timely notice of appeal when counsel acted diligently and in reliance upon statements of the trial court.[2] 947 F.2d at 1570-1571 (citing *Harnish* v. *Manatee County*, 783 F.2d 1535, 1538 (11th Cir. 1986)). As discussed above, however, Rule 60(b) was not applicable in the district court in this case because the district court was sitting as an appellate court in bankruptcy.[3]

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[2] *Useden* did not involve a situation where a party failed to receive notice of a district court order prior to the expiration of the time for filing a notice of appeal. The problem in that case was that the litigant had been induced by the conduct of the trial court to forgo filing a timely notice of appeal. 947 F.2d at 1571. In *Harnish* v. *Manatee County*, 783 F.2d 1535, 1537-1538 (11th Cir. 1986), the court of appeals held that a district court that was not sitting as an appellate court in bankruptcy could in appropriate circumstances vacate an order under Rule 60(b) to allow a party who had failed to receive notice of the order to file a timely notice of appeal. *Harnish* was decided prior to the adoption of Federal Rule of Appellate Procedure 4(a)(6).

[3] Prior to the adoption of Federal Rule of Appellate Procedure 4(a)(6), courts of appeals had taken divergent approaches as to the availability of Rule 60(b) relief to parties who failed to receive notice of a district court order or judgment before the expiration of the time for filing a notice of appeal. See *Wilson* v. *Atwood Group*, 725 F.2d 255, 257-258 (5th Cir.) (en banc), cert. dismissed, 468 U.S. 1222 (1984). No court, however, has addressed the relationship between Rule 60(b) and Federal Rule of Appellate Procedure 4(a)(6). Petitioner acknowledges as much in describing this case as a "case of first impression" (Pet. 8). As discussed in the text, the court of appeals also did not address that issue in this case

4. Petitioner's contention (Pet. 12-14) that the United States was obligated to file a cross-appeal in order to raise the jurisdictional issue in the court of appeals is without merit. A party need not file a cross-appeal in order to bring jurisdictional defects to the attention of an appellate court. See, *e.g.*, *Bullard* v. *Sercon Corp.*, 846 F.2d 463, 467-468 (7th Cir. 1988); *National Wildlife Federation* v. *Agricultural Stabilization & Conservation Service*, 955 F.2d 1199, 1202-1203 (8th Cir. 1992); *Big Country Foods, Inc.* v. *Board of Education of Anchorage School District*, 952 F.2d 1173, 1176 (9th Cir. 1992). As this Court has emphasized, "every federal appellate court has a special obligation to 'satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review,' even though the parties are prepared to concede it." *Bender* v. *Williamsport Area School District*, 475 U.S. 534, 541 (1986) (quoting *Mitchell* v. *Maurer*, 293 U.S. 237, 244 (1934)). Accord, *Philbrook* v. *Glodgett*, 421 U.S. 707, 721 (1975).[4]

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because Rule 60(b) relief was not available to the petitioner in the district court.

[4] Petitioner's reliance (Pet. 13-14) on *Alaska Industrial Board* v. *Chugach Electric Ass'n*, 356 U.S. 320 (1958), is misplaced. In that case, the respondent had argued unsuccessfully in the court of appeals that the Alaska Industrial Board lacked jurisdiction under state law to award the petitioner continuing benefits for temporary total disability, but had ultimately prevailed on the merits. This Court reversed the decision of the court of appeals and held that it would not consider the state law jurisdictional issue because respondent had not filed a cross-petition for certiorari. *Id.* at 324-325. That case thus addresses the need to cross-petition in this Court to raise issues not raised in the petition; it does not suggest that an appellee

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MICHAEL L. PAUP
Acting Assistant Attorney General

DAVID ENGLISH CARMACK
EDWARD T. PERELMUTER
Attorneys

JULY 1993

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must file a cross appeal to challenge the jurisdiction of a federal appellate court.